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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 PHILIP STOTT,

Case No. 3:19-cv-00133-MMD-WGC

7 Petitioner,

ORDER

8 v.

9 JAMES DZURENDA, *et al.*,

10 Respondents.
11

12 *Pro Se* Petitioner Philip Stott, a Nevada prisoner, filed a petition for habeas corpus
13 under 28 U.S.C. § 2254 in March 2019 (“2019 Petition”). (ECF No. 4.) Before the Court is
14 Respondents’ Motion to Dismiss (“Motion”). (ECF No. 8).¹ For the reasons discussed
15 below, Respondents’ Motion is granted.

16 **I. BACKGROUND²**

17 **A. Stott’s Criminal Case**

18 Stott challenges a conviction and sentence imposed by the Second Judicial District
19 Court for Washoe County. In July 2010, Stott entered a guilty plea to two counts of
20 burglary. (ECF No. 11-12.) The state court adjudicated Stott a habitual criminal on the
21 basis of 14 prior felony convictions in California and sentenced him to a term of ten years
22 to life on one count, and a concurrent term of 48 to 120 months on the other. (ECF No. 12-
23 6.) The judgment of conviction was entered on October 26, 2010. (*Id.*) Stott appealed.
24 (ECF No. 12-7.) The Nevada Supreme Court affirmed his conviction on September 14,
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26 _____
27 ¹The Court has reviewed Petitioner’s response. (ECF No. 22.) Respondents did not
file a reply and the deadline to do so expired without any request for extension.

28 ²This procedural history is derived from the state court record located at ECF Nos.
11–19, 23, and 25.

1 2011. (ECF No. 13-11.)

2 **B. State Post-Conviction Proceedings**

3 Stott filed a *pro se* state petition for writ of habeas corpus on December 16, 2011,
4 seeking post-conviction relief. (ECF No. 13-15.) After counsel was appointed, Stott filed a
5 counseled supplemental petition. (ECF No. 13-44.) The state court held an evidentiary
6 hearing and denied the state petition. (ECF No. 13-53; ECF No. 14-2.) Stott appealed.
7 (ECF No. 14-6.) The Nevada Court of Appeals affirmed the denial of relief. (ECF No. 15-
8 7.) A remittitur issued on April 11, 2016. (ECF No. 15-9.)

9 Eighteen months later, Stott filed a motion for modification of sentence on October
10 12, 2017. (ECF Nos. 15-15, 15-16.) The *pro se* motion sought relief based on the
11 retroactive reclassification of 11 of Stott's 14 prior felonies as misdemeanors pursuant to
12 a new California law known as "Proposition 47."³ The state court denied the motion,
13 acknowledging that California reduced 11 of Stott's 14 felony convictions to misdemeanors
14 but holding that Stott did not allege or show that, at the time of sentencing, the court
15 sentenced him pursuant to materially false assumptions of fact regarding his criminal
16 record. (ECF No. 15-25.) Stott appealed. (ECF No. 15-26.) The Nevada Court of Appeals
17 affirmed the state court's ruling. (ECF No. 19-4.) A remittitur issued on October 17, 2018.
18 (ECF No. 19-6.)

19 Stott filed a *pro se* petition for resentencing on October 29, 2018. (ECF No. 19-10.)
20 He claimed he was entitled to resentencing because Nevada law recognizes the
21 retroactive effect of Proposition 47. The state court denied this petition, finding that
22 California law is not binding on Nevada courts, and even if it was, Proposition 47 was
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24 ³On November 4, 2014, California voters enacted "Proposition 47," The Safe
25 Neighborhoods and Schools Act, codified at Cal. Penal Code § 1170.18 *et seq.* Once the
26 voters approved Proposition 47, it "became a duly enacted constitutional amendment or
27 statute." *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (internal quotations omitted).
28 Proposition 47 permitted individuals who have completed sentences for certain felony
offenses to apply for a reduction of their felony convictions to misdemeanors. Cal. Penal
Code § 1170.18(f). Proposition 47 also allowed individuals still serving sentences for a
felony conviction reduced to a misdemeanor under the new law to petition for a recall of
the sentence and request resentencing. Cal. Penal Code § 1170.18(a).

1 inapplicable because Stott was “not serving time for the 11 convictions that [were]
2 reclassified pursuant to Proposition 47, instead he [was] serving time for his convictions
3 of burglary and being found a habitual criminal pursuant to NRS 207.010(1)(b).” (ECF
4 No. 19-16.) Stott appealed. The Nevada Supreme Court dismissed the appeal for lack of
5 jurisdiction. (ECF No. 19-24.) A remittitur issued on March 29, 2019. (ECF No. 19-33.)

6 **C. Federal Habeas Proceedings**

7 On January 27, 2017, Stott initiated his first federal habeas corpus proceeding. See
8 *Stott v. Wickham*, 3:17-cv-0081-MMD-VPC, ECF No. 1 (“2017 Case”).⁴ Respondents
9 moved to dismiss the federal petition as unexhausted and non-cognizable. Stott opposed
10 by requesting leave to amend and a stay and abeyance. Stott sought a stay to exhaust a
11 claim regarding California Proposition 47—which was not alleged in his federal petition—
12 and, once it was exhausted, he would ask to reopen the 2017 Case and amend his petition
13 to include that claim.

14 Respondents’ dismissal motion was granted in part and denied in part. (2017 Case,
15 ECF No. 26.) The Court dismissed three claims as non-cognizable and found that two
16 were unexhausted. (*Id.* at 9.) The Court denied Stott’s request for a stay and abeyance
17 under *Rhines v. Weber*, 544 U.S. 269 (2005), finding that he failed to show good cause.
18 (*Id.* at 6–8.) The Court noted that California reclassified all but one of Stott’s felony
19 convictions in February 2016—well before Stott filed his federal petition—and the last was

20
21 ⁴Stott’s first federal petition alleged seven grounds: (1) NRS 207.010 does not
22 permit a life sentence enhancement on a category B felony, in violation of due process
23 under the Fifth Amendment; (2) the state court violated his due process rights under the
24 Fifth Amendment when it considered more prior convictions than contemplated by NRS
25 207.010; (3) the state court abused its discretion and violated his due process rights under
26 the Fifth Amendment by failing to dismiss the habitual criminal count and running his
27 sentences consecutively; (4) in seven prior convictions, Stott was not informed that such
28 convictions could later be used to justify a life sentence, which violated his due process
rights under the Fifth Amendment; (5) his life sentence pursuant to NRS 207.010 is
unconstitutional as applied to him, in violation of the Eighth Amendment prohibition against
cruel and unusual punishment; (6) he was coerced into pleading guilty by the prosecutor
and trial counsel with the threat of a life sentence without the possibility of parole, in
violation of his due process rights under the Fifth Amendment and right to effective counsel
under the Sixth Amendment; and (7) trial counsel failed to consult with him regarding
multiple continuances of his preliminary hearing, in violation of his rights to a speedy trial
and effective counsel under the Sixth Amendment. (See 2017 Case, ECF No. 6.)

1 reclassified in April 2017. However, Stott did not attempt to exhaust his Proposition 47
2 claim until filing the motion for modification of sentence in October 2017. Stott was thus
3 directed to either: (1) move to dismiss his unexhausted claims; (2) move to dismiss the
4 entire petition without prejudice in order to return to state court to exhaust his unexhausted
5 claims; or (3) file a motion for other appropriate relief, including a renewed motion for a
6 stay and abeyance. (*Id.* at 9.)

7 Stott asked the Court to dismiss his federal petition without prejudice to allow him
8 to return to the state court to exhaust his unexhausted claims. (2017 Case, ECF No. 27.)
9 Respondents did not oppose. (2017 Case, ECF No. 28.) The Court granted Stott's request
10 in September 2018, dismissing the federal petition in the 2017 Case without prejudice.
11 (2017 Case, ECF No. 30.)⁵

12 On March 8, 2019, Stott returned to this Court, initiating the current federal habeas
13 corpus proceeding *pro se*. (See ECF No. 1.) His 2019 Petition alleges one ground for relief
14 based on his Fifth, Sixth, and Fourteenth Amendment rights to due process and equal
15 protection ("Proposition 47 Claim"). (ECF No. 4 at 3–11.) Stott alleges that the habitual
16 criminal adjudication and resulting sentence are unconstitutional because California
17 reclassified 11 of his 14 felony convictions as misdemeanors under Proposition 47 and his
18 life sentence is no longer authorized under Nevada law. (*Id.*)

19 Respondents move to dismiss the 2019 Petition as untimely and unexhausted.
20 (ECF No. 8.)

21 **II. TIMELINESS**

22 **A. Legal Standard**

23 The Antiterrorism and Effective Death Penalty Act ("AEDPA") establishes a one-
24 year period of limitations for state prisoners to file a federal habeas petition pursuant to 28
25 U.S.C. § 2254. The one-year limitation period, *i.e.*, 365 days, begins to run from the latest
26 of four possible triggering dates:

27 (A) the date on which the judgment became final by the conclusion of direct

28 ⁵Stott did not appeal the judgment in the 2017 Case.

1 review or the expiration of the time for seeking such review;
2 (B) the date on which the impediment to filing an application created by
3 State action in violation of the Constitution or laws of the United States is
4 removed, if the applicant was prevented from filing by such State action;
5 (C) the date on which the constitutional right asserted was initially
6 recognized by the Supreme Court, if the right has been newly recognized
7 by the Supreme Court and made retroactively applicable to cases on
8 collateral review; or
9 (D) the date on which the factual predicate of the claim or claims presented
10 could have been discovered through the exercise of due diligence.

11 28 U.S.C. § 2244(d)(1).

12 The AEDPA limitations period is tolled while a “properly filed application” for post-
13 conviction relief is pending before a state court. 28 U.S.C. § 2244(d)(2). No statutory tolling
14 is allowed for the period of time between finality of the appeal and the filing of a petition
15 for post-conviction relief or other collateral review in state court, because no state court
16 application is pending during that time. *Nino v. Galaza*, 183 F.3d 1003, 1006–07 (9th Cir.
17 1999); *Rasberry v. Garcia*, 448 F.3d 1150, 1153 n.1 (9th Cir. 2006). No statutory tolling is
18 allowed for the period between the finality of an appeal and the filing of a federal petition.
19 *Nino*, 183 F.3d at 1007. The AEDPA limitation period is not tolled during the time that a
20 federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001).

21 Under Ninth Circuit precedent, a motion to correct or vacate an illegal sentence in
22 Nevada constitutes a “properly filed” application for collateral relief and results in statutory
23 tolling when it challenges the same judgment as the judgment the federal petition
24 challenges. *Tillema v. Long*, 253 F.3d 494, 499 (9th Cir. 2001). However, an application
25 for state post-conviction relief does not toll the AEDPA statute of limitations where it is filed
26 after AEDPA’s one-year limitation has expired. *Ferguson v. Palmateer*, 321 F.3d 820, 823
27 (9th Cir. 2003); *Jimenez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001).

28 **B. Stott’s Federal Petition is Untimely**

Respondents correctly point out that the 2019 Petition is untimely. Under
§ 2244(d)(1)(A), Stott’s conviction became final when the time expired for filing a petition
for writ of certiorari to the United States Supreme Court on December 13, 2011. AEDPA’s
statute of limitations began running the next day. Stott timely filed the state petition on

1 December 16, 2011, stopping the AEDPA clock. Two days elapsed between the finality of
2 the judgment and the filing of the state petition. The remaining 363 days of AEDPA
3 limitations period was statutorily tolled period during the pendency of all proceedings
4 related to the state petition. Tolling ended when the remittitur issued for the Nevada Court
5 of Appeals' order of affirmance on April 11, 2016. The AEDPA clock restarted the following
6 day and expired 363 days later on April 10, 2017. The AEDPA deadline was not tolled
7 during the pendency of the 2017 Case. See *Walker*, 533 U.S. at 181–82. Additionally, the
8 October 2017 motion for modification of sentence and October 2018 petition for
9 resentencing did not toll AEDPA's deadline because they were filed six and 18 months
10 after AEDPA's deadline had expired. See *Ferguson*, 321 F.3d at 823.

11 The 2019 Petition is also untimely when his deadline is measured under
12 § 2244(d)(1)(D) (starting the clock on “the date on which the factual predicate of the claim
13 or claims presented could have been discovered through the exercise of due diligence”).
14 Under § 2244(d)(1)(D), the limitations period begins to run when a prisoner “knows (or
15 through diligence could discover) the important facts, not when the prisoner recognizes
16 their legal significance.” See *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001).

17 The enactment of Proposition 47 and the resulting reclassification of Stott's
18 California convictions are the factual predicate for the Proposition 47 Claim he alleges in
19 the 2019 Petition. Although the state record does not pinpoint the exact date he learned
20 of the new law, Stott clearly knew of Proposition 47 no later than the date he sought relief
21 in California Superior Court—February 24, 2016. (See Petitions to Designate Charges in
22 the Complaint, Information, or Indictment as Misdemeanors (PC 1170.18(f)), Ex. 124, ECF
23 No. 15-16 at 1–6.) His petitions were granted two days later on February 26, 2016. (*Id.*)
24 Pursuant to § 2244(d)(1)(D), the latest date on which Stott knew of the factual predicate
25 for his Proposition 47 Claim was February 26, 2016. If AEDPA's one-year statute of
26 limitation began to run from that date, the deadline to file his Proposition 47 Claim would
27 have been February 27, 2017—even earlier than the April 10, 2017 deadline calculated
28

1 under § 2244(d)(1)(A).⁶ AEDPA requires that the one-year limitation period runs from the
2 latest of the four triggering dates, which was the date of finality under § 2244(d)(1)(A);
3 thus, Stott's filing deadline was April 10, 2017.

4 Stott argues that the AEDPA deadline did not begin to run until after the Nevada
5 Supreme Court dismissed his appeal regarding the petition for resentencing.⁷ (ECF No. 22
6 at 8–9.) This assertion fails because the Nevada Supreme Court's dismissal order is not
7 the factual predicate of his claim, it is Proposition 47 and the resulting reclassification of
8 Stott's California convictions. Additionally, statutory tolling was not available because the
9 April 2017 AEDPA deadline expired before Stott filed the October 2017 motion for
10 modification of sentence or October 2018 petition for resentencing. See *Jiminez v. Rice*,
11 276 F.3d 478, 482 (9th Cir. 2001) (holding that a state post-conviction petition filed after
12 the expiration of AEDPA's statute of limitations and could not toll an already expired
13 limitations period).

14 Absent a basis for tolling or delayed accrual, the Court concludes that the 2019
15 Petition is time-barred.

16 **C. Stott has not Demonstrated an Entitlement to Equitable Tolling**

17 The Supreme Court has held that AEDPA's statute of limitations "is subject to
18 equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010).
19 However, equitable tolling is appropriate only if the petitioner can show that: (1) he has
20 been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his
21 way and prevented timely filing. *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408,
22 418 (2005)). A petitioner "must show that some 'external force' caused his untimeliness,
23 rather than mere 'oversight, miscalculation or negligence'." *Velasquez v. Kirkland*, 639
24 F.3d 964, 969 (9th Cir. 2011) (quoting *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011
25

26 ⁶Because the 365th day fell on a weekend, Stott would have had until the following
27 Monday, February 27, 2017, to file his federal petition.

28 ⁷A remittitur was issued for his appeal on March 29, 2019 (ECF No. 19-29); thus,
his petition in the 2019 action, filed March 8, 2019, would be timely.

1 (9th Cir. 2009)). Accordingly, he must demonstrate a causal relationship between the
2 extraordinary circumstance and the lateness of his filing. *E.g.*, *Bryant v. Arizona Att. Gen.*,
3 499 F.3d 1056, 1061 (9th Cir. 2007) (untimeliness must be “caused by an external
4 impediment and not by [petitioner’s] own lack of diligence”); *Lott v. Mueller*, 304 F.3d 918,
5 922–23 (9th Cir. 2002) (court must examine whether, notwithstanding extraordinary
6 circumstances, the petitioner could have filed a timely petition). The petitioner bears the
7 burden of demonstrating that he is entitled to equitable tolling. *Espinoza-Matthews v.*
8 *California*, 432 F.3d 1021, 1026 (9th Cir. 2005). Equitable tolling is “unavailable in most
9 cases,” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), and “the threshold necessary
10 to trigger equitable tolling is very high, lest the exceptions swallow the rule,” *Miranda v.*
11 *Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quotation omitted).

12 Stott argues that Proposition 47 was an intervening change in law and the statute
13 of limitations is “misguided under the circumstances of this case.” (ECF No. 22 at 2.) The
14 Court construes his arguments as a request for equitable tolling. Stott asserts that
15 AEDPA’s time limitation should not bar his 2019 Petition because he timely asked the
16 California courts for reclassification once he learned of Proposition 47 and his applications
17 for collateral relief before the state court—the motion to modify sentence and petition for
18 resentencing—were not subject to time limitations.

19 Stott is not entitled to equitable tolling because he cannot show that an
20 extraordinary circumstance stood in his way and prevented timely filing. *See Holland*, 560
21 U.S. at 649; *Grant v. Swarthout*, 862 F.3d 914, 926 (9th Cir. 2017) (a petitioner must show
22 that the “extraordinary circumstances” were the *cause* of his untimeliness). Stott does not
23 allege that any extraordinary circumstance stood in his way to prevent him from filing the
24 Proposition 47 Claim, and the record indicates that his access to the courts was not
25 obstructed in any way. After California voters approved Proposition 47, Stott was able to
26 file multiple applications for collateral relief and related appeals in the California Superior
27 Court and Nevada courts between February 2016 and March 2019 when he filed the 2019
28 Petition. Equitable tolling is thus unavailable.

III. CERTIFICATE OF APPEALABILITY

The standard for the issuance of a certificate of appealability requires a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). The Supreme Court has interpreted § 2253(c) as follows: “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074, 1077–79 (9th Cir. 2000).

Applying this standard, the Court finds that a certificate of appealability is unwarranted in this case. The Court will therefore deny Stott a certificate of appealability.

IV. CONCLUSION

In accordance with the foregoing, it is therefore ordered that Respondents' motion to dismiss (ECF No. 8) is granted.

It is further ordered that Petitioner's petition for writ of habeas corpus (ECF No. 4) is dismissed with prejudice as time-barred.

It further is ordered that a certificate of appealability is denied, as reasonable jurists would not find the district court's dismissal of the federal petition as untimely to be debatable or wrong, for the reasons discussed herein.

The Clerk of Court is instructed to enter final judgment accordingly, in favor of Respondents and against Stott, dismissing this action with prejudice and close this case.

DATED THIS 16th day of March 2020.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE